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No. 06-475

IN THE

Supreme Court of the United States

BLUE CROSS BLUE SHIELD OF FLORIDA, INC., *et al.*,

Petitioners,

v.

ABBOTT LABORATORIES, and
GENEVA PHARMACEUTICALS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Respondent Abbott Laboratories has no parent corporation and no publicly-held company owns 10% or more of its stock.

Respondent Geneva Pharmaceuticals, Inc. (now known as Sandoz Inc.) ("Geneva") states that Novartis AG is the only company directly or indirectly affiliated with Geneva that has outstanding securities in the hands of the public.

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INTRODUCTION

Petitioners mailed their requests to opt out of a class settlement on Thursday, April 7, 2005, at 11:06 p.m. The deadline for the claims administrator's receipt of the opt-out requests, one thousand miles away, was Monday, April 11, 2005. Petitioners, moreover, used ordinary mail rather than Priority Mail. Not surprisingly, Petitioners' opt-out requests were received after the deadline.

Because Petitioners requested postal return receipts, they quickly received notice of their untimeliness. Yet Petitioners did not promptly seek relief from the deadline. Only when the claims administrator reported to the district court, two months later, that Petitioners' requests were untimely did Petitioners move the district court for leave to opt out late.

The district court asked Petitioners to explain why they waited until the last minute to mail their opt-out requests. Petitioners first responded that they needed the time to compile purchase data that was allegedly "required" to be submitted with the opt-out requests. But the evidence showed that it was crystal clear to Petitioners and their counsel that the data at issue was *not* required. Further, Petitioners failed to introduce any evidence that the data they did submit could not have been compiled earlier. Petitioners have now dropped any argument that they were justified in waiting until the eleventh hour to mail their opt-out requests.

The district court found that it "could reasonably conclude that the [Petitioners] waited until the last minute *intentionally* with the hopes of minimizing the chance that the Defendants might seek to terminate the [class] settlement on April 11, 2005, based on their exclusions." In other words, the delay in mailing appeared to be a deliberate, strategic choice.

On this record — devoid of any evidence of diligence or good faith by Petitioners or any legitimate explanation for Petitioners' delay in mailing — and applying the excusable neglect analysis outlined in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993), the district court in its discretion declined to grant Petitioners leave to opt out late. In an unpublished order, the Court of Appeals for the Eleventh Circuit summarily affirmed the district court's exercise of its discretion.

In now seeking *certiorari* from this unremarkable summary affirmance of an unremarkable exercise of discretion, Petitioners cite illusory "circuit splits" on the excusable neglect standard. Petitioners' own descriptions of the cases, however, make clear that the supposed circuit splits in reality are no more than courts applying *agreed-upon* legal principles to different factual scenarios and, therefore, reaching different outcomes. Indeed, the court of appeals' decision here was an unpublished summary affirmance; it did not enunciate any new legal principles.

For example, Petitioners claim a circuit split on what constitutes prejudice under *Pioneer*. But Petitioners' cases on one side of the supposed "split" involve motions for relief from default judgments, and the cases on the other side involve class opt-out and claim deadlines. Courts applying the *Pioneer* analysis properly focus first and foremost on the nature of the omission and the relief sought. The prejudice caused by ignoring a class opt-out or claim deadline negotiated as part of a settlement is very different from the prejudice caused by setting aside a default judgment. There is no inconsistency in the lower courts' treatment of the two situations.

Similarly, there is no circuit split on whether purported delays in the mail can constitute excusable neglect. The lower courts agree that missed deadlines attributable to the ordinary vagaries of the mail do not constitute excusable neglect. The cases cited by Petitioners in support of their supposed "split"

all involve extraordinary circumstances where documents were mailed far enough in advance to be received in the ordinary course but were delayed by storms or lost in the postal system. Many of the cases involve mail that took many days to travel very short distances. This case does not involve a storm, lost mail, or mail taking many days to travel a very short distance. This case involves mail which was simply sent too late to guarantee delivery by an imminent deadline.

Even if Petitioners' imagined circuit splits existed, this case would not be appropriate for *certiorari*. The decision below was based on indisputable and unchallenged factual findings that clearly support the result, regardless of the nuances of the lower courts' decisions applying *Pioneer*. The district court relied upon the Petitioners' mailing their opt-out requests at the last minute, their failure to explain their lack of diligence, and the absence of any evidence of good faith.

COUNTER-STATEMENT OF THE CASE

A. MDL Litigation Background.

This petition is taken from indirect purchaser antitrust class actions that, together with direct purchaser class and individual actions, was consolidated by the Judicial Panel on Multi-District Litigation under the caption *In re Terazosin Hydrochloride Antitrust Litigation*, MDL No. 1317 (S.D. Fla.). That litigation challenged a patent settlement between Defendants relating to the prescription drug Hytrin® and its generic alternative, terazosin hydrochloride.[1]

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[1] Petitioners describe the *allegations* in the Federal Trade Commission's complaint challenging Defendants' patent settlement. *See* Petition at 5-6 ("According to the FTC..."). No judicial or administrative *determinations* are discussed, however, and the allegations discussed are incomplete and misleading. Because the FTC's allegations are irrelevant to the issues here, Defendants do not address

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In April 2004, the district court certified indirect purchaser classes including both consumers and third-party payors ("TPPs") of medical expenses. Petitioners are seven insurance companies who are TPP members of the certified classes. Along with eight other insurance companies, Petitioners are part of the "Illinois TPP" plaintiff group, who joined together to file a duplicative action in Illinois state court.

Defendants filed a petition for leave to appeal the class certification order under Federal Rule of Civil Procedure 23(f). The Eleventh Circuit granted leave. *See* Eleventh Circuit Appeal No. 04-12761-D. That appeal challenged, *inter alia*, the ability of TPPs (like Petitioners here) to recover alleged overcharges on pharmaceuticals given that the TPPs pass on any overcharge to their insureds.

In mid-February 2005, the parties informed the district court that they had reached a global settlement of the MDL cases. The global settlement included separate agreements with the direct class, the indirect classes, and all non-class plaintiffs save one. The Rule 23(f) appeal was to be voluntarily dismissed as part of the MDL settlement.

The one MDL party who did not settle was Kaiser Foundation Health Plan, Inc., also represented by Petitioners' counsel. The *Kaiser* action was remanded to the Central District of California for trial. At trial in March 2006, the jury returned a defense verdict, finding that Defendants' patent settlement did not cause any harm.[2]

(Cont'd)

them at length. A description of the underlying facts of the MDL litigation can be found in *Valley Drug Co. v. Geneva Pharms., Inc.*, 344 F.3d 1294, 1298-03 (11th Cir. 2003).

[2] Kaiser's appeal from the verdict is pending in the Ninth Circuit. *See Kaiser Foundation v. Abbott Laboratories*, U.S. Court of Appeals for Ninth Circuit, No. 06-55687.

The district court gave final approval to the indirect purchaser settlement on June 29, 2005, at the end of a two-day hearing, finding the settlement to be fair, reasonable, and adequate. *See* Doc. 1632,[3] Transcript (June 29, 2005) at 113:13-114:20. The district court memorialized its order in a written opinion dated July 8, 2005. Petitioners did not object to the settlement.[4]

B. Requests to Opt Out of the Settlement Had To Be Received by the Claims Administrator by April 11, 2005.

Under the terms of the indirect purchaser settlement agreement, opt-out requests had to be received by the claims administrator in West Palm Beach, Florida by Monday, April 11, 2005. This deadline was clearly and prominently explained on the opt-out forms.[5] *See* Pet. App. at 46a-48a.

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[3] "Doc." refers to the entries in the district court's docket.

[4] Petitioners sought permission to submit late objections on June 30, 2005, the day *after* the hearing at which the district court announced its final approval of the settlement. *See* Doc. 1600. The motion for late objections did not itself contain any objections and was denied. *See* Pet. App. at 14a. Petitioners filed but then voluntarily dismissed an appeal from this denial and from the final approval order. *See* Doc. 1639.

[5] There is no merit to Petitioners' suggestion that the opt-out deadline was ambiguous and could be read to mean not receipt by April 11, 2005 but instead mailing "in time to be received" by April 11, 2005. First, Petitioners have never claimed – much less submitted evidence – that they actually relied on this creative reading of the opt-out form. To the contrary, Petitioners' initial papers to the district court, for example, acknowledge their understanding that the deadline was for receipt by April 11, 2005. *See* Doc. 1580 at 1; Doc. 1602 at 2. Second, Petitioners did not argue to the district court that there was any ambiguity in the opt-out notice. *See id.* Finally, the argument is irrelevant because Petitioners' opt outs were obviously not sent in time to be received by April 11, 2005.

The opt-out form for the indirect purchaser settlement requested — but did not require — that TPPs list the amounts paid for Defendants' products in each class state. *See* Pet. App. at 50a.

The district court found that the April 11 deadline was a "vigorous[ly] negotiat[ed]" provision of the settlement agreement. *See* Pet. App. at 8a. The April 11 deadline was tied to Defendants' deadline to terminate the *direct* purchaser settlement based on TPP opt outs from the indirect purchaser settlement.[6] *See* Doc. 1524, Exh. A at 12. The district court specifically noted this linkage and the very limited time Defendants had to evaluate TPP opt outs under the schedules negotiated by the parties. *See* Doc. 1532, Transcript (Mar. 2, 2005) at 26:8-29:2.

Petitioners claim to this Court that Rider A to the settlement agreement has some relevance to this appeal. This is a red herring. Petitioners admit that they were invited to file a motion with the district court regarding the relevance of Rider A. *See* Pet. at 14. Petitioners never filed such a motion and have never argued to the district court — the court most knowledgeable about the settlement of this litigation — that Rider A has any particular relevance to the opt-out issues.

C. Petitioner Waited Until the Last Minute to Mail Their Opt-Out Requests.

Petitioners were well placed to submit any opt-out requests in a timely manner. Petitioners had advance notice of the settlement and the April 11 opt-out deadline because their counsel was also counsel to Kaiser, an individual plaintiff in

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[6] Petitioners emphasize Defendants' May 9, 2005 deadline to terminate the indirect purchaser settlement. But Defendants desired only a global settlement, and the April 11 deadline for TPP opt outs was linked to Defendants' deadline to terminate the *direct* purchaser class settlement.

the MDL proceedings. *See* App. at 6a. Petitioners admit that they also knew well in advance of the settlement that the opt-out forms would request employer identification numbers (EINs) and purchase data, "based on common practice in class action settlement opt-outs." *See* Doc. 1602, Exh. 4 ¶¶ 1, 4. Indeed, Petitioners admitted that they began collecting some of the requested information "as early as January 31, 2004" —*fifteen* months before the opt-out deadline. *See id.* ¶ 4. Petitioners had also already collected, if not thoroughly analyzed, their purchase data by the time of the settlement notice. *See id.* ¶ 10.

Despite the advance notice and preliminary work, Petitioners (and the eight other members of the Illinois TPP group) waited until Thursday, April 7, 2005, at 11:06 p.m., to mail their opt-out requests from Washington, D.C. To compound matters, the district court found, Petitioners chose to use regular mail, rather than the post office's Priority Mail service. Petitioners' claim to have mailed their opt-out forms "four days" in advance of the deadline is highly misleading. The forms were mailed just before midnight on Thursday, and needed to be received on Monday.

Not surprisingly, the opt-out requests of 14 of the 15 Illinois TPPs arrived late. Due to misrepresentations by the Illinois TPPs, however, the district court initially understood that only the seven opt-out requests submitted by Petitioners here were late. Defendants and the district court did not discover until months later that the opt-out forms of seven additional Illinois TPPs were also untimely. The district court granted Defendants' motion to correct the record under Federal Rule of Civil Procedure 60(b) to treat these opt outs as also late. That decision is currently on appeal to the Eleventh Circuit.

D. Petitioners Waited Months to Seek Relief From the Opt-Out Deadline, Blaming the Post Office.

Petitioners claimed not to have known before June 16, 2005, that any of their exclusion forms were received late. *See* Doc. 1580, Exh. A ¶ 8. But Petitioners mailed their opt-out requests "certified, return receipt." *Id.* ¶ 6. The dates stamped on the return receipts, not to mention the postal service's on-line tracking system for certified mail,[7] would promptly have told counsel that the requests had been late. Nonetheless, Petitioners did not seek timely relief from the missed deadline until months later, after the claims administrator submitted a report listing their opt outs as untimely.

Petitioners' motion in the district court criticized the post office for not delivering the mail by the next business day. *See* Doc. 1580 at 2-3. No explanation was offered for the decision to wait until the last minute to mail the opt-out requests. Nor did Petitioners mention the return receipts, much less explain why they had not sought relief in mid-April when they received these documents back from the postal service.

E. Petitioners Then Blamed a Fictitious "Requirement" to Provide Purchase Data.

At the final approval hearing, the district court rejected the Illinois TPPs' effort to "blame the post office department for what counsel should have undertaken in a more responsible manner." *See* Doc. 1631, Transcript (June 28, 2005) at 13:23-14:1.

Petitioners immediately changed tack and insisted that they had needed until April 7 to prepare the state-by-state purchase data "required" by the opt-out forms: "They were mailed on April 7th because . . . . [w]e were required to turn in

[7] The tracking system can be accessed at www.usps.com/cttgate.

documentation showing payments by — state by state." *Id.* at 14:3-19. The record contained no factual support for this assertion. Petitioners had not even mentioned this supposed cause for the delay in their moving papers. *See id.* at 36:4-12; Pet. App. at 6a-7a.

In reality, the opt-out forms did not *require* any purchase information. As the district court recognized, the information was merely *requested* to minimize the possibility of discovery down the road. *See* Pet. App. at 8a & n.6.

The distinction between required and requested data could not have been lost on Petitioners and their counsel. In another similar pharmaceutical antitrust case just a few years earlier, two of the Petitioners represented by the same lead counsel decided not to opt out but to object to the settlement. *See In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 389 & n.29 (D.D.C. 2002). In justifying that decision, Petitioners' lead counsel cited the great burden of opting out given the "requirement" to provide data. *Id.* at 397.

The *Lorazepam* court found that statement "disturbing" and "appalling" because it "grossly misrepresented facts to the Court." *Id. See also id.* at 398 n.42 (other statements by counsel regarding opt outs "ambiguous and disgenuine, if not totally incredible"). As here, it was clear that "the information for opt-outs . . . was requested, not required." *Id.* at 397-98.

F. Opt-Out Requests Without EINs or Purchase Data Were Also Submitted at the Last Minute.

In *Lorazepam*, Petitioners' counsel had submitted other opt-out requests without providing any purchase data, demonstrating actual knowledge that data was not required. *See id.* at 397. The same is true here.

One of the Petitioners, CareFirst, Inc., submitted an opt-out form in this litigation without any of the supposedly "required" purchase data. *See* Doc. 1643, Singla Decl. ¶ 24, Exh. 13. Another Petitioner, Federated Mutual, provided no EINs other than its own. *See id.* ¶ 25, Exh. 14. Petitioners' counsel also represents Kaiser and six related entities in the MDL proceedings in the current litigation. The opt-out forms submitted by these entities also did not contain any of the supposedly "required" purchase data. *See id.* ¶ 23, Exh. 12.

Yet all of these opt-out requests were also mailed at the last minute. The CareFirst and Federated Mutual forms were mailed at 11:06 p.m. on April 7, 2005. The Kaiser forms were mailed on April 6 or 7, 2005 (but managed to arrive on April 11). *See* Doc. 1566, Exh. 6 to Exh. 2.

These opt-out forms demonstrate not only that Petitioners and their counsel knew that purchase data was not required to opt out, but also that *they waited until the last minute to submit opt-out forms even when there was limited or no data to compile or collect.* It was perfectly reasonable for the district court to suspect that the decision to wait until April 7 was not related to the need to compile or collect data.

G. The Decisions Below.

At the final approval hearing, the district court heard testimony and argument on the issue of late opt outs. The court then ruled from the bench and denied Petitioners leave to submit late opt-out forms. *See* Doc. 1632, Transcript (June 29, 2005) at 108:10-109:16. The ruling was reduced to a written order dated July 8, 2005, which was then amended to correct a clerical error on July 14, 2005 (the "Order Regarding Opt-Outs").[8] *See* Pet. App. at 3a – 15a; Doc. 1615.

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[8] The order included in Petitioners' Appendix is the uncorrected July 8 version.

The district court rejected Petitioner's efforts to blame the post office and found no evidence that their opt-out requests had been misrouted or lost in the mail. The court found that that Petitioners had not mailed the opt-out forms far in enough in advance of the deadline for them reasonably to rely on the post office's delivering the forms before the deadline. The court then held that the Petitioners had not established excusable neglect because they had failed to introduce any evidence justifying the failure to mail the exclusion forms before April 7. *See* Pet. App. at 8a-9a. Petitioners had not even provided a credible explanation for waiting until April 7 at almost midnight to mail their opt-out forms.

The district court relied also on Petitioners' failure to exercise reasonable diligence. Petitioners had not used priority mail, a form of first-class mail. *See id.* at 6a n.2. Nor had Petitioners checked with the claims administrator on April 11, or thereafter, to confirm whether their exclusion requests had been timely received and to make any necessary alternative delivery arrangements. *See id.* at 7a n.3.

The district court noted also that Petitioners had introduced no evidence demonstrating their good faith. *See id.* 8a. To the contrary, the district court found that it "could reasonably conclude that the Petitioners waited until the last minute *intentionally* with the hopes of minimizing the chance that the Defendants might seek to terminate the IPP settlement on April 11, 2005, based on their exclusions."[9] *Id.* (emphasis added).

Petitioners had a clear motive to make sure their opt-outs did not cause Defendants to terminate the settlement; Petitioners wished to avoid a decision in Defendants' pending appeal of

[9] Although the ultimate deadline to terminate the indirect purchaser settlement based on TPP opt-outs was May 9, the April 11 deadline was linked to Defendants' deadline to terminate the direct purchaser class settlement. *See* Doc. 1524, Exh. A at 11-12. As noted, Defendants had previously decided to settle all of the class claims or none of them, and the settlement agreements had reciprocal termination rights.

the indirect purchaser class certification order. If Defendants had obtained the relief they sought in that appeal (a ruling that insurance companies cannot recover alleged overcharges passed on to their insureds), it would have seriously undermined Petitioners' claims. Although Petitioners suggest to this Court that Defendants' pending appeal did not affect their claims (Pet. at 30), the reality is that Petitioners submitted an *amicus* brief in that appeal and explained to the Eleventh Circuit that their pending claims "may be adversely affected by a decision" in Defendants' favor.[10]

Finally, the district court rejected as a factual matter Petitioners' claim (repeated to this Court) that they had previously expressed their intention to opt out of the class settlements. *See* Pet. App. at 8a n.5.

Petitioners then appealed to the United State Court of Appeals for the Eleventh Circuit. On May 3, 2006, the Eleventh Circuit issued an unpublished, *per curium* opinion summarily affirming the district court's ruling in all respects.

REASONS FOR DENYING THE PETITION

I. There Are No Circuit Splits Here.

Petitioners try to invent circuit splits by citing cases that apply well-established and agreed upon legal principles to different sets of facts. But different results on different facts do not create a circuit split.

A. There Is No Circuit Split Regarding the Potential Prejudice From Exemptions to Class Claim or Opt-Out Deadlines.

Courts have found — consistent with the decisions below in this case — that increased litigation exposure resulting from

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[10] *See* Amicus Brief of Putative Class Members, at 1 (Nov. 12, 2004), Eleventh Circuit Appeal No. 04-12761.

the extension of a class opt-out or claim deadlines can constitute prejudice under the Rule 6(b) "excusable neglect" analysis. *See, e.g., Pigford v. Johanns,* 416 F.3d 12, 21-22 (D.C. Cir. 2005) (recognizing prejudice Defendant might suffer from permitting late claims); *In re Diet Drug (Phentermine/ Fenfluramine/Dexfenfluramine) Products Liability Litig.*, 92 Fed.App'x. 890, 893-894 (3rd Cir. 2004) (unpublished) (recognizing that late opt out would prejudice Defendants by requiring them to litigate the class member's claims); *In re New England Mut. Life Ins. Co. Sales Practices Litig.*, 204 F.R.D. 6, 14 (D. Mass. 2001) (finding that the "most persuasive [factor] in this case, is the danger of prejudice to the Defendants" if class members permitted to opt-out late and pursue separate actions).[11]

Petitioners claim there is a circuit split on this issue because courts considering motions *to vacate a default judgment* under Rule 60(b)(1) have refused to recognize as prejudice the need to litigate the claim on the merits.[12]

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[11] Petitioners cite one case supposedly to the contrary. Not only did that case pre-date *Pioneer,* but the class member seeking to opt out late was not pursuing claims against the party seeking to enforce the opt-out deadline, changing the prejudice analysis. *See In re Four Seasons Sec. Laws Litig.*, 493 F.2d 1288, 1289 n.1 (10th Cir. 1974).

[12] Petition at 18-22. *See, e.g., FG Hemisphere Associates, LLC v. Democratic Republic of Congo*, 447 F.3d 835, 836 (D.C. Cir. 2006) (appeal from denial of relief under Rule 60(b) from default judgment); *TCI Group Life Ins. Plan v. Knoebber,* 244 F.3d 691, 695 (9th Cir. 2001) (same); *Bateman v. U.S. Postal Service*, 231 F.3d 1220, 1224 (9th Cir. 2000) (same); *Pratt v. Philbrook*, 109 F.3d 18, 22 (1st Cir. 1997) (same); *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 812 (4th Cir. 1988) (same); *Hibernia Nat. Bank v. Administracion Cent. Sociedad Anonima*, 776 F.2d 1277, 1280 (5th Cir. 1985). In one case that predates *Pioneer*, the Seventh Circuit suggested in passing that the need to litigate a case on the merits could be cognizable prejudice even in the context of a motion to vacate a default judgment. *See Chrysler Credit Corp. v. Macino*, 710 F.2d 363, 367 (7th Cir. 1983).

This is not a circuit split, but a reflection of the differences between requests to vacate default judgments and requests for relief from class deadlines. In *Pioneer,* the Court explained that the "excusable neglect" determination should "tak[e] account of all relevant circumstances surrounding the party's omission." *Pioneer*, 507 U.S. at 395. One of the most important circumstances, if not the most important circumstance, is the nature of the omission and the relief sought. As the District of Columbia Circuit has explained, excusable neglect determinations in one context are not easily applied in another context. *See In re Vitamins Antitrust Class Actions*, 327 F.3d 1207, 1210 (D.C. Cir. 2003) ("we doubt the applicability of such precedents to the present case [involving a late opt-out] because each involves an attorney's failure to file a timely notice of appeal").

As for opt-out and claim deadlines of the sort at issue in this case, they are critical for the management of class actions and are strictly enforced: "leave for an extension of time to opt out . . . is an infrequent occurrence." *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 177 F.R.D. 216, 237 (D.N.J. 1997). Courts also properly respect bargained-for settlement structures and class deadlines. Liability beyond what was bargained for in a class settlement is a well-recognized form of prejudice resulting from late opt outs or claims. *See, e.g., In re Diet Drug Litig.*, 92 Fed. App'x. at 893-94 (late opt out would prejudice Defendant by "subject[ing] it to significantly greater potential damages" and causing them to lose at least part of the "benefit of the settlement agreement"); *FG Hemisphere*, 447 F.3d at 840 (recognizing that *Pigford* court was concerned with the effect of late claims on the Defendant's bargained-for settlement).[13]

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[13] Contrary to Petitioners' claim, there is no intra-circuit split within the District of Columbia Circuit. The two cases were decided differently for the very reasons given by that Circuit. The prejudice analysis in each case differed because *Pigford* involved a claims deadline in a class settlement and *FG Hemisphere* involved a default judgment.

By contrast, default judgments are considered "appropriate only in extreme circumstances" and Rule 60(b) is "liberally applied" to set them aside. *TCI Group Life,* 244 F.3d at 696. The beneficiary of a default judgment is not deemed to be prejudiced by having to litigate on the merits. *See id.* Whereas the beneficiary of a default judgment might be considered to receive a "windfall," the same cannot be said for the Defendant in a class settlement seeking to enforce a negotiated claim or opt-out deadline. Unlike the beneficiary of a default, a class action Defendant bargains and pays for a specific outcome or deadline. Moreover, class settlements, unlike default judgments, are the product of litigation on the merits.

In short, the different outcomes in the cases cited by Petitioners do not represent a circuit split. Each of the courts cited by Petitioners applied the same flexible excusable neglect analysis laid out in *Pioneer* and the same standards for identifying prejudice to the non-movant. The different outcomes are the result of widespread *agreement* that motions to vacate default judgments present different considerations than motions for relief from class opt-out or claims deadlines.

B. There Is No Circuit Split Regarding Whether Purported Mail Delays Can Constitute Excusable Neglect.

It is not excusable neglect for counsel to mail a document at the last minute assuming that it will definitely be delivered in just a couple of days. There is no dispute over this principle among the lower courts.[14] A "litigant who decides to rely on the vagaries of the mail must suffer the consequences if the notice of appeal fails to arrive within the applicable time period."

[14] Petitioners cite *Sherlock v. Montefiore Med. Ctr.*, 84 F.3d 522, 525-26 (2d Cir. 1996), but in that case the court merely provided three extra days, by analogy to Federal Rule of Civil Procedure 6(e), to respond to EEOC right-to-sue letters sent in the mail (consistent with every circuit to consider that issue). Nothing in the decision suggests that parties can meet filing deadlines by mailing documents three days in advance.

Thompson v. E.I. DuPont de Nemours & Co., Inc., 76 F.3d 530, 534 (4th Cir. 1996). *See also, e.g., Penrod Drilling Co. v. U.S.*, 925 F.2d 406, 408 (Fed. Cir. 1991) (when ordinary mail arrives later than hoped, "[s]uch a foreseeable result cannot be labeled either excusable neglect or good cause"); *In re Crider,* No. 98-2376, 2000 WL 191823, *3 n.3 (6th Cir. Feb. 10, 2000) (unpublished) ("Mail delays, however, are not grounds for excusable neglect."); *Reinsurance Co. of Am., Inc. v. Administratia Asigurarilor de Stat*, 808 F.2d 1249, 1252-53 (7th Cir. 1987) (not excusable neglect to assume document mailed on December 24 would arrive on December 27); *New England Mut. Life*, 204 F.R.D. at 14 (risk that mail sent at the last minute would not be quickly processed rests with mailing party).

The cases cited by Petitioners to establish a supposed "circuit split" involve situations where the moving party mailed the document far enough in advance that it was reasonable to expect timely delivery *and* the delay was caused by unusual circumstances such as misrouting[15] or storms.[16] In some cases, relief was granted only because the mail was sent reasonably in advance of the deadline but ended up taking inexplicably long

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[15] *See In re Cendant Corp. Prides Litigation*, 233 F.3d 188, 197 (3d Cir. 2000) (noting that "misrouted mail" can constitute excusable neglect).

[16] *See U.S. v. Carson*, 52 F.3d 1173, 1180 & n.6 (2d Cir. 1995) (no abuse of discretion in district court's finding of excusable neglect where notice of appeal took four days to travel 100 miles from Mount Ephraim, New Jersey to Manhattan, during a snow storm). Petitioners also cite *Maryland Casualty*, but in that case the Tenth Circuit found no excusable neglect even though the party's lead lawyer had died unexpectedly. *See Maryland Cas. Co. v. Conner*, 382 F.2d 13 (10th Cir. 1967). The passage Petitioners quote are not the Tenth Circuit's words but the words of a commentator. He suggests that delayed mail can constitute excusable neglect where the lawyer mails the document twice as many days ahead of the deadline as is ordinarily required *and* "a storm or other unforeseen cause of delay delayed the delivery.'" *Id.* at 16-17 (*quoting* Robert L. Stern, *Changes in the Federal Appellate Rules*, 41 F.R.D. 297, 298-299 (1966)). As explained further below, those are not the facts here.

to travel a very short distance.[17] Although such circumstances might provide ground for relief from a missed deadline, there is no authority for the proposition that the normal vagaries of the mail can constitute excusable neglect — much less that a district court as a matter of law must find excusable neglect in this circumstance.[18] There is no circuit split here, just some cases with extraordinary facts.

II. This Case Would Not Be a Good Vehicle to Resolve Any Circuit Split.

A. Relief Is Unavailable Because the Opt-Out Deadline Was a Negotiated Term of the Settlement.

Certiorari is inappropriate here also because, even if Petitioners could establish excusable neglect, relief would still

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[17] *See, e.g., Ramseur v. Beyer*, 921 F.2d 504, 505-07 (3d Cir. 1990) (finding excusable neglect where notice of appeal took 13 days to travel less than five miles from East Orange to Newark, New Jersey); *Zipperer v. School Bd. of Seminole County, Fla.*, 111 F.3d 847, 849-50 (11th Cir. 1997) (no abuse of discretion in district court's finding of excusable neglect for notice of appeal that took more than six days to travel less than 50 miles from Rockledge and Orlando, Florida); *Tarabishi v. McAlester Regional Hosp.*, 951 F.2d 1558, 1563 n.3 (10th Cir. 1991) (finding no "clear abuse of discretion" in district court's finding of excusable neglect where notice of appeal took four days to travel 50 miles from Tulsa to Muskogee, Oklahoma); *Gibbs v. Town of Frisco City, Alabama Police Dept.*, 626 F.2d 1218, 1220 (5th Cir. 1980) (notice of appeal took three days to travel 163 miles from Selma to Mobile, Alabama). All distances are taken from maps.google.com.

[18] Petitioners cite *Sanchez v. Board of Regents of Texas Southern University*, 625 F.2d 521 (5th Cir. 1980), in which the Fifth Circuit noted that reliance on "the *normal* course of delivery of mail" can constitute excusable neglect. *Id.* at 522 (emphasis added). In that case, however, the court ultimately found that the appellant had not established excusable neglect for its late filing. *See Sanchez v. Board of Regents of Texas Southern University*, 633 F.2d 1210, 1211 (5th Cir. 1981). With its reference to the "normal course of delivery of mail," the Fifth Circuit was presumably referring to the kinds of extraordinary cases (*e.g.*, storms and misrouted mail) in which courts have found excusable neglect.

not be available to Petitioners. The result below was mandated on the separate and additional ground that the deadline at issue here was a negotiated term of the parties' class settlement agreement. Every lower court to have considered the issue has held that Rule 6(b) does not authorize modification of deadlines agreed to as part of the bargain in a class settlement.[19]

The settlement agreement here set April 11, 2005, as the deadline for the claims administrator to receive opt-out requests. *See* Doc. 1534, Exh. 1 at 13, 19-21. The district court found that "the deadlines [] were the product of vigorous negotiations" given Defendants' goal of settling the MDL litigation on a global basis. Pet. App. at 8a. Petitioners cannot have the contractual term changed for their sole benefit over Defendants' objection.

Courts may refuse to approve a settlement, but courts may not "modify settlement terms or in any manner to rewrite the agreement reached by the parties." *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1160 (11th Cir. 1983). *See also Pettway v. Am. Cast Iron Pipe Co.*, 576 F.2d 1157, 1172 (5th Cir. 1978) (although "court in reviewing a settlement may make suggestions . . . it may not unilaterally change the decree"). The need to enforce settlement agreements as written "is especially important where, as here, virtually every line and paragraph of the settlement document, and in many instances individual words, are the end products of intense, adversary and prolonged negotiations." *Alliance to End Repression v. City of Chicago*, 91 F.R.D. 182, 195 (N.D. Ill. 1981).

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[19] The district court did not rely on this principle in the ruling on appeal, but has since agreed that the settlement agreement's deadline controls. *See* Doc. 1672 at 2-3. On the merits, Defendants may defend the district court's determination on any ground, regardless of whether the ground was relied upon by the courts below. *See U.S. v. New York Tel. Co.*, 434 U.S. 159, 166, (1977) ("the prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted").

This general principle has been applied to opt-out and claim deadlines just as to any other term of a settlement. Although Rule 6(b) authorizes district courts to alter *court*-imposed deadlines, the lower courts have consistently held that an opt-out or claim deadline negotiated as part of a settlement agreement may not be modified under Rule 6(b).

In *In re New England Mutual Life*, for example, the court denied a Rule 6(b) motion from a class member whose opt-out request was one day late. The court explained that "the parties bargained for a specific cut-off date in the settlement negotiations. It is an elementary principle of contract law that when parties bargain for a mutually-accepted date, that date has a special legal significance to the agreement." 204 F.R.D. at 13. The court distinguished cases permitting late opt outs where the court, rather than the parties, had set the opt-out deadline.[20] *See id.*

In *Dahingo v. Royal Caribbean Cruises, Ltd.*, 312 F. Supp. 2d 440 (S.D.N.Y. 2004), the court denied a request to submit a late claim also because "the bar date in this case was agreed upon by the parties, not selected by the Court":

> [T]he court is not entitled to expand or contract the agreement of the parties . . . . This principle is strictly followed in class actions where the relief requested would exceed that which the parties had bargained for.

Id. at 445-46. Other cases are in accord. *See, e.g., Kahler v. County of Rensselaer*, No. 03-CV-1324, 2005 WL 1981300, at *2 (N.D.N.Y. Aug. 17, 2005) (denying motion for late class claims because deadline was part of settlement agreement);

[20] Petitioners cited below numerous cases in which courts modified deadlines that were *not* specifically negotiated as part of a settlement agreement. Those cases are inapposite.

In re ML-Lee Acquisition Fund II, No. CIV-A-94722, 1999 WL 184135, at *2 (D. Del. Mar. 23, 1999) ("to accept late-filed proofs of claim and timely filed, but late-corrected proofs of claim would, in essence, be to rewrite the Settlement Agreement . . . a result that substantially modifies the understanding negotiated between Plaintiffs and Defendants"); *Yanda v. Vanguard Meter Serv.*, No. 92 CIV 2827, 1995 WL 358663, at *3 (S.D.N.Y. June 14, 1995) ("The Settlement contains an agreed-to bar date after which claims will not be considered. Because the twenty-six claims at issue here were filed after that date, they may not share in the Settlement Fund.").

In *In re Cendant Corp. Prides Litigation*, the Third Circuit permitted late claims specifically *because* the "District Court determined that any extension . . . would 'not change the bargained-for terms of the Stipulation' because the parties had not negotiated for a date-certain." 233 F.3d 188, 191 (3d Cir. 2000). Rather "the deadline had been left blank" by the parties "and was set by the court." *Id.* at 193. This was the "one crucial way in which this case is distinguishable from *In re ML-Lee*" (discussed above). *Id.* at 193 n.5.

Petitioners' challenges to application of the excusable neglect analysis here would thus not be outcome dispositive in any event. The late opt-out requests could not have been accepted because the deadline at issue was a material, bargained-for term of the settlement agreement.

B. There Has Been No Showing of Excusable Neglect Under Any Proposed Standard.

The district court made specific factual findings that preclude relief regardless of the merits of Petitioner's arguments about the correct legal standard. To the extent Petitioners take issue with the district court's findings — regarding whether Petitioners exercised reasonable diligence, demonstrated their good faith, threatened to prejudice Defendants, or mailed the

opt-out requests early enough reasonably to expect timely delivery — those findings were affirmed by the court of appeals and are entitled to great deference.[21] Moreover, a claim that those findings were erroneous would be a claim merely of misapplication of the law to the facts and not worthy of *certiorari*. *Cf.* Sup. Ct. R. 10.

1. The district court found that Petitioners mailed their opt-out forms at the last minute.

The facts here are a far cry from cases involving misrouted mail, storms, and the like. There is no evidence of any misrouted mail. There is no evidence of any storms.

In the cases on which Petitioners rely, moreover, the document was mailed well in advance of the deadline. As the district court found, that was not the case here. *See* App. at 6a-7a. The district court did not, thus, erect any kind of "*per se*" rule of refusing to consider a purported mail delay as excusable neglect. Rather, the court found that the issue here was not mail delayed by the post office, but mail sent by Petitioners too late to guarantee timely delivery.

Petitioners sent their opt-out requests by ordinary mail from Washington, D.C. at 11:06 p.m. on Thursday April 7, 2005, effectively Friday morning. This left just *one business day* for delivery 1000 miles away in West Palm Beach, Florida, by the

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[21] A late opt-out request "involves a case-management decision in a complex class action, in which *district court discretion is at its greatest*." *In re Vitamins Antitrust Class Actions*, 327 F.3d 1207, 1210 (D.C. Cir. 2003) (emphasis added). "Given the highly deferential standard under which we review the district court's decisions concerning opt-out requests . . . , we must afford the court's determination fairly broad latitude." *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 268 F.3d 627, 634 (8th Cir. 2001), *vacated on other grounds*, 536 U.S. 919 (2002) (citation omitted).

Monday, April 11 deadline.[22] It should surprise no one that the opt out forms were received after the deadline. That is not postal delay, but the unremarkable fact that mail can take longer than Petitioners allotted to reach a destination 1,000 miles away.

Thus, even if it were it reasonable to assume that mail will assuredly arrive in some period of time, here there was not "enough lead time in the normal course for the opt-outs to be received by the deadline." Petition at 23. The district court in its discretion found unconvincing Petitioners' assertion that it was reasonable to *assume* that their opt outs would be delivered from Washington to West Palm Beach so quickly.[23] And the facts here disprove Petitioners' claims: 14 of the 15 opt out requests sent by their counsel at 11:06 p.m. from Washington, D.C. failed to arrive on time.

The supposed circuit split advanced by Petitioners regarding the treatment of mail delays is irrelevant here.

2. Petitioners have failed to explain their delay.

The district court found that the untimeliness here was caused by Petitioners' decision to wait until the last minute to

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[22] The district court stated that Petitioners sent the opt outs *two* business days in advance because Petitioners refused to disclose when on April 7 they mailed the forms. *See* App. at 6a-7a. Even when the district court asked them flat out, Petitioners refused to disclose the time of mailing. *See* Doc. 1631, Transcript (June 28, 2005) at 13: 22-24 ("I found Miss Wallace's affidavit very interesting. They were all mailed about the same time, but she doesn't disclose when. Were they mailed at midnight?"). Petitioners have now been forced to admit that the district court guessed right: the forms were mailed at close to midnight.

[23] *See, e.g.*, Doc. 1631, Transcript (June 28, 2005) at 13:14-17 (asking why Petitioners "wait[ed] until April 7th to mail them, given the speed with which mail occurs in the United States today").

send their opt-out forms. *See* App. at 6a-7a. The district court asked Petitioners to explain "the reason for the delay" so that it might make an excusable neglect finding. *Pioneer*, 507 U.S. at 395. But Petitioners failed to provide any credible explanation for the decision to wait until 11:06 p.m. on April 7. Although Petitioners initially claimed that the delay was due to the need to compile purchase data requested by the opt-out forms, they introduced no supporting evidence. Indeed, the affidavits provided by Petitioners' expert and counsel pointedly did not state that the purchase data could not have been compiled earlier. *See, e.g.*, Doc. 1647, Vieux Decl., Exh. D. Rather, Petitioners' counsel has explained that they began gathering the relevant information more than a year before the settlement. Doc. 1602, Vieux Decl., Exh. 4 ¶¶ 1-4.

By itself, the failure to explain the delay required the district court to deny relief. "[W]ithout a predicate explanation of the events that occasioned the . . . delinquency (*i.e.*, the reason for the failure to deliver a timely 'opt out' notice), the analysis of excusable neglect is effectively impossible." *Demint v. NationsBank Corp.*, 208 F.R.D. 639, 643 (M.D. Fla. 2002).

3. Petitioners' failed to exercise reasonable diligence before and after the mailing.

The district court found also that Petitioners failed to exercise reasonable diligence both before and after the last-minute mailing. Without a showing of reasonable diligence, there was no basis for relief. *Cf. Ramseur,* 921 F.2d at 506 (noting that "counsel, upon learning of the delay, acted expeditiously to cure it, by promptly moving for an extension under Rule 4(a)(5)"); *Tarabishi,* 951 F.2d at 1563 n.3 (noting that "[u]pon learning that it had been filed late, Defendants/cross-appellants filed a motion for extension of time").

This Court has also expressed the view that litigants are expected to take appropriate precautions when submitting documents by mail. In creating a special mailbox-rule for notices of appeal filed by *pro se* prisoners, the Court explained that there was no reason to adopt a mailbox rule for ordinary litigants because:

> they can follow its progress by calling the court to determine whether the notice has been received and stamped, knowing that if the mail goes awry they can personally deliver notice at the last moment or that their monitoring will provide them with evidence to demonstrate either excusable neglect or that the notice was not stamped on the date the court received it.

Houston v. Lack, 487 U.S. 266, 271 (1988).

These are exactly the sort of precautions that, as the district court found, Petitioners failed to take. Not only did Petitioners wait until the last minute to mail their opt-out forms but Petitioners also failed to use Priority Mail. *See* App. at 6a n.2. Petitioners also failed to take the simple precaution of contacting the claims administrator on April 11 to check if their opt-out requests had been received (at which time Petitioners could have faxed or emailed the requests as back-up). *See id.* 7a n.3. Petitioners failed also to promptly seek relief from the deadline even though they received return receipts in mid-April informing them that their opt-out requests were late. Petitioners' claim to have "simply placed [the return receipts] in the file" without looking at them; but that only reinforces the conclusion that Petitioners were not diligent. Doc. 1647 at 3.

There is no basis under any standard in any case to find excusable neglect given this utter lack of diligence.

4. There is no evidence of good faith by Petitioners.

A party seeking relief under the excusable neglect standard must also demonstrate its good faith. The district court found that Petitioners had failed to provide any "affidavit or other evidence" establishing good faith. Pet. App. at 8a & n.6.

Indeed, the district court found that it "could reasonably conclude that the [Petitioners] waited until the last minute *intentionally* with the hopes of minimizing the chance that the Defendants might seek to terminate the IPP settlement on April 11, 2005, based on their exclusions." *Id.* at 8a (emphasis added). As explained above, Petitioners were concerned about Defendants' pending appeal in the Eleventh Circuit from the indirect purchaser class certification. *See supra* at 10. By sending their opt-out requests at the last minute, Petitioners might have minimized the chances of Defendants' terminating the settlement and proceeding with the appeal based on their opt outs. The district court found it reasonable to conclude that, far from being in good faith, the late opt outs were an effort to gain a tactical advantage.

Petitioners claim that good faith was demonstrated by their efforts to compile purchase data requested by the opt-out forms. But Petitioners' story regarding the data has flip-flopped to such a degree as to be wholly unreliable, and the district court was certainly within its discretion to reject it. In their initial Rule 6(b) motion and affidavit, Petitioners did not even mention the time allegedly needed to compile data. *See generally* Doc. 1580 & Exh. A, Aff. of Wallace. Then Petitioners insisted to the district court that this data was "required" by the opt-out requests. *See* Doc. 1631, Transcript (June 28, 2005) at 14-16, 24-27. When, as happened in *Lorazepam*, the district court criticized that mischaracterization of the opt-out form, Petitioners backpedaled and claimed that although the data was not required, it did cause

the delayed mailing. *See* Doc. 1602 at 2, 6-7. But that claim was shown to have no factual basis inasmuch as Petitioners have never introduced any admissible evidence that the data could not have been compiled sooner. Now, before this Court, Petitioners artfully and carefully discuss the data issue without asserting that the need to compile data caused any delay. *See* Petition at 13 n.17.

In the absence of a demonstration of good faith, Petitioners' would not have been entitled to relief under the excusable neglect standard regardless of the analysis of mail delays and prejudice. The resolution of the supposed circuit splits would not affect the outcome of this case.

III. Petitioners' Position Would Transform Filing Deadlines Into Postmark Deadlines.

Petitioners' proposed rule would undermine all filing deadlines under the Federal Rules. Contrary to Petitioners' claim, relief is not "mandated" under Rule 6(b) whenever mail is not received in three days (much less in one or two days). Pet. at 24 n.27. To adopt Petitioners' position would transform all filing deadlines into postmark deadlines (unless perhaps an opposing party could demonstrate spoliated evidence or witnesses made unavailable in the interim). Notices of appeal, for example, would merely need to be postmarked 27 or 28 or even 29 days from entry of judgment, not filed within 30 days. *Cf.* Fed. R. App. P. 4(a)(1). Motion papers would merely need to be mailed to the court a couple of days before the filing deadline, rather than timely filed with the clerk. The excusable neglect standard was not intended to eliminate the legal effect of filing deadlines.

Petitioners would have this Court create the very kind of *per se* rule rejected in *Pioneer*. *See* 507 U.S. at 389-395. The "flexible" and "elastic" analysis espoused by *Pioneer* must leave room for a district court familiar with the parties, the situation,

and the record to exercise its discretion to deny relief where it concludes that reasonable diligence and good faith were not demonstrated.

CONCLUSION

The petition for *certiorari* should be denied.

Respectfully submitted,

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